

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

IN RE: Case No. 01-01139 (JKF)  
W. R. GRACE & CO., et al., Chapter 11  
Jointly Administered  
Debtors. Nov. 17, 2003 (12:20 p.m.)  
Wilmington

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE JUDITH K. FITZGERALD  
UNITED STATES BANKRUPTCY COURT JUDGE

Proceedings recorded by electronic sound recording;  
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1 THE COURT: This is the matter of W.R. Grace, 01-  
2 1139. I will place the call while people come into the  
3 podium. Hello, this is Judge Fitzgerald.

4 MS. DANZEISEN (TELEPHONIC): Hello, Judge  
5 Fitzgerald. This is Allyn Danzeisen, and I represent the  
6 asbestos property damage claims.

7 THE COURT: Will you spell your last name, please?

8 MS. DANZEISEN (TELEPHONIC): Sure, it's D-a-n-z-e-  
9 i-s-e-n.

10 THE COURT: Thank you.

11 MS. DANZEISEN (TELEPHONIC): Thank you.

12 THE COURT: Is anyone else on the phone?

13 MS. DANZEISEN (TELEPHONIC): Just me.

14 THE COURT: Okay. I have some information that Ms.  
15 Wagner (phonetical) may have attempted to call in. Has she  
16 been given the number too?

17 MS. BAER: Your Honor, we had two parties.

18 THE COURT: Yes, Elizabeth Wagner and Ms.  
19 Danzeisen, as far as I know.

20 UNIDENTIFIED SPEAKER: Your Honor, we circulated  
21 the call information last week, and to my knowledge Ms.  
22 Wagner has it as well as --

23 THE COURT: Okay. So anyone can call in who  
24 chooses to; is that correct?

25 UNIDENTIFIED SPEAKER: That's correct.

1 THE COURT: Okay. Good afternoon.

2 MS. BAER: Good afternoon, Your Honor. Janet Baer  
3 on behalf of the debtor.

4 THE COURT: Ms. Baer.

5 MS. BAER: Your Honor, turning to the agenda,  
6 matter number 1 has been continued to the December 15th  
7 hearing.

8 THE COURT: Excuse me while I get my notes, I'm  
9 sorry.

10 MS. BAER: Okay.

11 THE COURT: Okay, I apologize.

12 MS. BAER: No problem.

13 THE COURT: All right, yes, number one is  
14 continued.

15 MS. BAER: Number 2, Your Honor, you entered an  
16 order I believe on Thursday or Friday on the chief operating  
17 officer matter.

18 THE COURT: Yes, I did.

19 MS. BAER: That takes us to number 3. Your Honor,  
20 number 3 is the continued application of the debtor to employ  
21 State Street Bank, an investment company, as the investment  
22 manager and fiduciary for the Grace stock and the Grace  
23 savings plan. If you recall, Your Honor, this is a situation  
24 where Grace's current officers who manage this duty as well  
25 as the Board of Directors have a conflict between what they

1 need to do as representatives of the Chapter 11 estate in  
2 terms of putting together a Chapter 11 plan and their duties  
3 under ERISA. Under these circumstances, Your Honor, the  
4 debtors made a search, interviewed numbers of candidates, and  
5 ultimately determined that State Street Bank was the  
6 appropriate party. Your Honor, in their sound business  
7 judgment they felt that State Street was the appropriate  
8 party. They have the expertise. Their fees are actually at  
9 the low end of the market for this kind of business, and  
10 they're willing to take on the key fiduciary role under ERISA  
11 and have the financial wherewithal and insurance to back up  
12 their fiduciary responsibilities. Your Honor, we received  
13 two objections. The first objection was from the Unsecured  
14 Creditors Committee who challenged whether it was appropriate  
15 for the company versus the actual employees in the plan to  
16 pay State Street's fees. The second objection was from the  
17 Equity Committee who did not like State Street, and I think  
18 at the last hearing voiced the thought as, Is there somebody  
19 else who can do this. Your Honor, with respect to the first  
20 issue as we indicated in the affidavits from Brian McGowan  
21 from State Street and from Paul Norris we believe that in our  
22 sound business judgment the employees should not be paying  
23 for these services. This is really a fiduciary  
24 responsibility that the company had been taking on. It had  
25 never been charged to the employees, and State Street is

1 taking over this fiduciary responsibility given the nuance to  
2 Chapter 11 and the conflict that it puts the company in.  
3 Your Honor, the marketplace is indicated by State Street's  
4 affidavit. It is clear that this is normally the sort of  
5 responsibility financially that is taken on by the company.  
6 In addition, Your Honor, these employees are our rank and  
7 file. The effect on their morale, the effect on general  
8 fairness to charge them for taking on this kind of a duty is  
9 simply inappropriate, and Grace in its fiduciary duties or  
10 Grace in its responsibilities determined that with sound  
11 business judgment this was not an appropriate charge to pass  
12 onto the employees. With respect to the Equity Committee's  
13 objection, Your Honor, I believe you continued this matter  
14 for today so that the Equity Committee could continue to  
15 explore the possibility of others. Your Honor, we submitted  
16 an affidavit and supplemental filing from Paul Norris, the  
17 president of Grace, indicating that Grace did in fact  
18 consider whether there were other employees of the company or  
19 ex-employees who could take on the responsibility. As  
20 outlined in the affidavit, Grace determined that there were a  
21 number of qualifications, if you will, that someone would  
22 need. Number one, a knowledge of the marketplace and the  
23 ability to tap into the support necessary in order to make  
24 decisions about this kind of stock and the appropriateness of  
25 trading it, selling it, or holding it in a Chapter 11

1 context. Number two, someone who is knowledgeable on ERISA  
2 matters and the fiduciary responsibilities that go with  
3 ERISA. Number three, frankly someone who is not involved in  
4 decision-making with respect to the potential Chapter 11 plan  
5 hearing that very well could have a substantial impact on the  
6 holdings of the stock, whether to hold them, whether to sell  
7 them; and number four, someone who is willing to take on the  
8 fiduciary responsibilities and had insurance or the financial  
9 backing to support those responsibilities. In Grace's  
10 conclusions from looking into this, they concluded there were  
11 no management employees that they felt would be appropriate  
12 and met the qualifications necessary to take on the  
13 responsibility. With respect to former employees, Grace  
14 considered various scenarios there and again found nobody  
15 that had both the qualifications to take on the  
16 responsibilities and the financial wherewithal or really  
17 agreement to take on the risk involved with the fiduciary  
18 responsibilities. Not only is there a risk that can be  
19 insured, but there's personal risk that is very difficult to  
20 have someone take on. And also, Your Honor, having an  
21 employee take on the responsibilities would still raise  
22 implications about the Board and its fiduciary duty and the  
23 conflict that it is in. Under those circumstances, Your  
24 Honor, Grace concluded that it was not appropriate to give  
25 this responsibility to a former employee or a current

1 employee and in its sound business judgment concluded that  
2 State Street was still the very best alternative to go  
3 forward and take on this responsibility. Your Honor, I think  
4 it's very clear under the Montgomery Court's case and other  
5 cases that this is a matter that is something within the  
6 sound business judgment of the company and absent opponents  
7 raising -- absent opponents frankly bringing evidence that  
8 would suggest that it is an inappropriate exercise of sound  
9 business judgment, the matter should be -- the deference  
10 should be given to the business judgment of the company. The  
11 Equity Committee has not filed anything that we're aware of  
12 or supplied any evidence whatsoever that would suggest that  
13 this is not within our sound business judgment and an  
14 appropriate exercise of sound business judgment. We again  
15 have supplied now three affidavits: One from State Street,  
16 one from Brian McGowan the senior executive VP of the  
17 company, and one from Paul Norris our president. Under those  
18 circumstances, Your Honor, we believe that it is appropriate  
19 to employ State Street in this position. It's appropriate to  
20 have the company pay State Street's fees, and we do ask that  
21 the order be entered.

22 THE COURT: All right. Who wants to be heard from  
23 the objecting parties? Good afternoon.

24 MR. SASSON: Good afternoon, Your Honor. Moshe  
25 Sasson from Strouck & Strouck & Levin on behalf of the

1 Creditors Committee. Your Honor, the Creditors Committee  
2 continues to object to the debtors' application on the  
3 grounds that it takes the burden the debtors' estate and its  
4 creditors with the fees and expenses that only benefit a  
5 certain block of the equity holders. At the last hearing,  
6 Your Honor granted a continuance to give the parties an  
7 opportunity to see whether a less expensive alternative to  
8 State Street was available and also directed the parties to  
9 negotiate how the fees of State Street or some alternative  
10 investment manager should be paid. As the Equity Committee  
11 will likely address in further detail we have learned that  
12 there were less expensive alternatives to State Street. For  
13 example, the debtors interviewed Aeon FC (phonetical), the  
14 investment fiduciary retained by Federal Mogul and United  
15 Airlines, and we understand that the terms of the Aeon  
16 proposal in this case were significantly cheaper than State  
17 Street to the tune of about \$150,000 a year. We understand  
18 the debtors chose State Street over Aeon based solely on the  
19 fact that State Street provided more fiduciary liability  
20 insurance to protect the plan participants in the event that  
21 the investment manager fails to perform the requisite duties  
22 in an appropriate manner. Given the existence of a less  
23 expensive alternative to State Street and mindful of the  
24 Court's intent to minimize the costs to the plan  
25 participants, the Creditors Committee along with the Equity



1 Committee proposed a compromise whereby a small portion of  
2 State Street's anticipated fees and expenses would be born by  
3 the participants with the remainder of such fees and expenses  
4 to be born born by the estate. Specifically, the Creditors  
5 Committee and the Equities Committee proposed that the plan  
6 participants pay a one percent annual management fee, a  
7 reasonable benchmark in the manage investment industry with  
8 the remainder of the reasonable fees and expenses born by the  
9 estate. Under this proposal the estate would bear up to  
10 about seventy percent of the anticipated fees and expenses  
11 with the average plan participant incurring approximately \$20  
12 per quarter in management fees and expenses. In this regard,  
13 I think it's important for the Court to know that the plan  
14 participants currently pay management fees and expenses in  
15 connection with other investment options under the plan while  
16 those investments in Grace stock receive preferential  
17 treatment under the plan. It may have made business sense  
18 outside of bankruptcy but there's no reasoned basis for the  
19 estates to continue to bear the costs of continuing to prefer  
20 investments in Grace stock held by the plan, especially where  
21 cheaper alternatives were available and the plan participants  
22 are benefitting from the extra fiduciary --

23 THE COURT: What does the plan say if anything  
24 about where those costs go? Because I don't think I have the  
25 ability if the current plan allocates those fees and says

1 that the employees will not bear any portion of that  
2 investment advisory cost for investing in Grace stock. I  
3 think without something more, I can't just willy-nilly change  
4 an ERISA plan; can I?

5 MR. SASSON: I don't know if the plan prohibits  
6 that, but I think the Court has the inherent authority to  
7 charge these expenses to the --

8 THE COURT: Absolutely I don't. If the ERISA plan,  
9 I think, was very clear that whatever the plan and the plan  
10 documents are that have gone out to those retirees, I think  
11 the Court has an obligation to continue those in effect until  
12 the debtor or some other party moves to have some change;  
13 don't I? Now, there may be a difference if the plan  
14 documents themselves say that the debtor has the right to  
15 change that component, but without looking at the documents  
16 and seeing what they say, I don't think I can impose a charge  
17 on an ERISA-qualified plan that isn't therein the plan  
18 without --

19 MR. SASSON: Well, perhaps the debtors can address  
20 that, but it's my understanding that the plan does allow the  
21 charging of fees and expenses to the participants.

22 THE COURT: To other -- yeah, investments and other  
23 than Grace stock.

24 MR. SASSON: Correct. Well, Your Honor, that  
25 proposal was rejected by the debtors, and we believe that

1 it's more than fair and respectfully request that the Court  
2 enter that order if it has the ability to do so. And lastly,  
3 Your Honor, at the last hearing the Court indicated that to  
4 the extent the Court was inclined to grant the debtors'  
5 application it would require that the fees of any  
6 professionals retained by State Street be subject to the same  
7 audit and review procedures as the professionals in this  
8 case.

9 THE COURT: Yes, I did say that, yes, thank you.

10 Thank you.

11 MR. SASSON: Thank you.

12 THE COURT: Good afternoon.

13 MR. BECKER: Good afternoon, Your Honor. Gary  
14 Becker from Kramer Llevin Naffalis & Frankel for the Equity  
15 Committee. Your Honor, I believe there is a slight  
16 misimpression about our objection. It's no particular  
17 antipathy to State Street. We were concerned about the  
18 expense and whether it was necessary at all. As counsel for  
19 the Creditors Committee mentioned to you we talked to them,  
20 we talked to the debtor about alternatives to State Street,  
21 and I have no reason to believe that their business judgment  
22 is not accurate and that State Street is qualified and  
23 capable of doing this work. I do understand that there was  
24 an alternative that was less expensive by \$150,000, and one  
25 of our suggestions, which we also discussed with the debtor,

1 was that they either get a former employee or one of their  
2 credit employees and segregate the function so that they  
3 wouldn't have that problem of inside information which would  
4 lead to potential liability, and I believe they've explained  
5 in their supplemental affidavit of why they didn't think that  
6 was appropriate. We also agree with the debtor that it is  
7 not, you know, practical or appropriate to change their  
8 officer's compensation in any way with respect to this issue.  
9 The one issue that I do want to make sure that the Court is  
10 aware of is what is it that the debtor is buying for between  
11 530,000 and a million dollars a year? The issue is when the  
12 current officers who run the investments in this plan and  
13 manage the stock and have some information, inside  
14 information that affects the cost of the stock, and they  
15 don't trade on that information. Now let's take the worst  
16 case. The stock right now there's about ten million in  
17 shares in the investment plan. The stock is trading in  
18 around the mid-\$3 level. I believe last week 3.31. Worst  
19 case, they have knowledge of us. They have a plan of  
20 reorganization that would result in the equity recovering  
21 saying, say nothing. We hope that will never come to pass  
22 but say nothing. The maximum damages you would ever have is  
23 \$33 million. But there's more to it than that, Your Honor,  
24 because under ERISA there are limits on what the plan can  
25 sell. They can sell either one percent of the -- in a

1 quarter, either one percent of the outstanding float or they  
2 average a weekly volume of shares that trade. Last week I  
3 believe the weekly volume was 1.57 million. So say roughly  
4 up to two million shares, say \$3 a share, 3.50 a share,  
5 you're between six and seven million dollars damages if they  
6 had inside information that would totally wipe out the stock  
7 and they didn't sell. And for that they're paying maybe a  
8 million dollars a year. Now, yes, the debtor's business  
9 judgment must be respected, but it's not a free ride, and we  
10 believe that paying a million dollars a year to guard against  
11 the potential liability of that maximum, six to seven million  
12 dollars, is too expensive, and that's the basis of our  
13 objection, Your Honor. Thank you.

14 MS. BAER: Your Honor, a couple of matters. First  
15 of all, Your Honor, again is the debtor's sound business  
16 judgment.

17 THE COURT: But that's an awfully expensive  
18 insurance policy, a million dollars a year potentially,  
19 500,000 to a million dollars a year for maximum damages of  
20 six to seven million.

21 MS. BAER: Well, Your Honor, it depends a lot on  
22 what is going to happen here, what the timing is, and what  
23 the stock is going to be trading at. You have to realize,  
24 Your Honor --

25 THE COURT: That's true.

1 MS. BAER: -- the Equity Committee is in a conflict  
2 position, and the Equity Committee wants us to remain in a  
3 conflict position. The Equity Committee here does not want  
4 Grace to, if you will, give away their interests. They like  
5 us being in conflict because then we've got to think of both  
6 things at the same time, which is precisely why we shouldn't  
7 be in that position. It absolutely makes no sense to have  
8 somebody at Grace involved.

9 THE COURT: Well, I don't disagree that at this  
10 point in time there should be somebody -- I'll say neutral as  
11 opposed to independent, but neutral taking a look at this  
12 issue and deciding when it's advisable to sell or not to sell  
13 stock. I don't disagree, but it does seem to me that the  
14 cost is very high. Now, I don't know if it's going to cost a  
15 million dollars a year of \$150,000 savings by so many other  
16 entities is really that significant on ten million shares  
17 allocated over that time. It's not a very expensive addition  
18 to use the investment banker that the debtor chooses. So,  
19 I'm not sure about that, but I am questioning, I guess, what  
20 the ERISA documents show. I mean, if -- I appreciate why  
21 Grace does not want the employees to bear this burden of this  
22 cost, however, if the ERISA documents already provide that  
23 they're bearing the cost of investments in other than Grace  
24 stock, then why can't they bear some proportion of the  
25 investment in Grace stock?

1 MS. BAER: Your Honor, I'm not an expert on the  
2 ERISA documents, but it's my understanding that the only fee  
3 that they're paying now is some minimal administrative fee,  
4 and so we're not talking really about apples and apples here,  
5 we're talking about apples and oranges.

6 THE COURT: So it's not an investment fee in other  
7 stock, it's simply a flat administrative fee.

8 MR. MCGOWAN: Your Honor, the participants pay a  
9 flat fee of \$6 per quarter for just the overall investment in  
10 the 401K plan, it's an administrative fee. So it's flat, it  
11 has nothing to do with what investment you're in. It's \$6  
12 per quarter.

13 UNIDENTIFIED SPEAKER: (Microphone not recording.)

14 MR. MCGOWAN: Oh, I'm sorry. Brian McGowan with --

15 MS. BAER: Your Honor, again under those  
16 circumstances we're really talking apples and oranges here.  
17 We realize this is very expensive, but we're in a very  
18 different situation than we were prior to bankruptcy, and  
19 it's a very serious situation. Frankly, we chose State  
20 Street over Aeon because State Street is more financially  
21 capable of backing up their fiduciary responsibility here.  
22 They have better insurance. They have better financial  
23 wherewithal, and we wanted to make sure that every protection  
24 that was necessary would be taken, that's why we chose them.

25 THE COURT: Well, I -- In most cases I'd say

1 \$150,000 a year is -- may mean the difference. In this case,  
2 with ten million shares having to be traded I think that  
3 you're talking pennies on a share. It doesn't make much  
4 sense to worry about that additional cost. If that's the  
5 issue, I don't think that's the concern. And I do agree that  
6 the debtor needs somebody independent looking at this right  
7 now because you're going to have to put a plan together and  
8 one way or another it's going to have to address the stock.  
9 Is there some way to limit the time frame within which the  
10 investment advisor decides whether these shares should be  
11 traded or not and sets a time frame within which they're  
12 either done or they're not done.

13 MS. BAER: Your Honor, I'm not sure how we could do  
14 that. This is an ongoing process.

15 THE COURT: Because at a certain point in time, if  
16 Grace reorganizes, is there's still going to be the prospect  
17 of employees investing in new Grace stock?

18 MS. BAER: At this point, not having a plan on file  
19 and knowing what it would say, who knows? I mean it's  
20 certainly a circumstance where if we retained State Street,  
21 if it's not appropriate at some point in time to continue to  
22 retain them, that's an issue that can be taken up in review  
23 when appropriate.

24 THE COURT: Well, it seems to me that that may be  
25 the issue. I mean if it's advisable to trade in Grace stock



1 then the advisor should do that and should make the trade and  
2 that, I guess, ought to be the end of it except that I don't  
3 know if employees are still investing in Grace stock; are  
4 they?

5 MS. BAER: No, they're not, Your Honor.

6 THE COURT: Okay.

7 MS. BAER: At this point in time we're talking  
8 simply about whether it should be sold.

9 THE COURT: Okay. So why don't we just put a  
10 finite time limit within which they can decide whether or not  
11 to sell.

12 MS. BAER: Well, Your Honor, it seems to me that  
13 that would be rather difficult because the circumstances  
14 today versus the circumstances six months from now when a  
15 Chapter 11 plan are on file it could be very different.

16 THE COURT: Yes, they could, and that's the risk  
17 either up or down, and I think the investment banker could  
18 notify everybody who holds Grace stock that this company is  
19 still in the throes of Chapter 11, at this point doesn't have  
20 a plan on file, and, you know, they take a risk. They could  
21 end up losing their investment because the stock could be  
22 worthless. They could end up making a fortune because it  
23 might be worth a whole lot of money, or they can sell right  
24 now for X-dollars and give them that choice.

25 MS. BAER: I'm not sure that that would fulfill

1 their fiduciary responsibilities.

2 THE COURT: Why not? That's what investment  
3 bankers do all the time.

4 MS. BAER: It is, but they've got to look at the  
5 timing and what the circumstances are here --

6 THE COURT: Sure, that's what I'm saying.

7 MS. BAER: -- versus then.

8 THE COURT: Exactly. That's what I'm saying.  
9 Let's put a finite time period within which this can be done,  
10 and then you don't run the risk of millions of dollars year  
11 after year.

12 MS. BAER: Your Honor, with State Street not being  
13 here, I certainly can't question as to whether or not they'd  
14 be uncomfortable or comfortable with that. May I perhaps  
15 suggest that why don't we put the retention on a certain time  
16 frame, and we can review it with this Court again in several  
17 months?

18 THE COURT: All right. Maybe that's fair enough.  
19 Maybe that's a good way to do it because I'm concerned that  
20 this is just going to go on and on and on and at a certain  
21 point in time I think it's too expensive for this estate  
22 because it does benefit a very select -- I mean, when I say  
23 "select" I mean small group of employees or retirees, I'm not  
24 sure which, maybe both.

25 MS. BAER: Actually, Your Honor, it benefits almost

1 everyone. We have tremendous participation in the plan, so  
2 this is the rank and file of Grace's hundreds of employees.

3 THE COURT: But you're only talking --

4 MS. BAER: But the dollars are maybe not that  
5 significant in terms of the huge group.

6 THE COURT: But State Street's only there to look  
7 at the investment in Grace; correct? Not the overall  
8 investments. So, it's --

9 MS. BAER: Right.

10 THE COURT: I mean, I don't know whether every  
11 employee is invested in Grace, maybe they are, but regardless  
12 of that fact, it seems to me that there should be some  
13 limitation on this time limit. Gentlemen, what about that as  
14 a solution, limit their retention to a certain period of  
15 time, and then decide whether it should be continued or not?

16 MR. SASSON: I think that sounds reasonable.

17 MR. BECKER: So do I, Your Honor.

18 THE COURT: Okay, then the question is, how long?

19 MS. BAER: Your Honor, our suggestion would be a  
20 year. It seems --

21 THE COURT: Probably reasonable.

22 MS. BAER: -- that's reasonable.

23 THE COURT: I don't want to create a false market,  
24 and I also don't want to depress the stock by creating this  
25 market. It seems to me that a year is a reasonable period.

1 Gentlemen?

2 MR. BECKER: That's fine, Your Honor.

3 THE COURT: All right. I'll take a revised order  
4 that will appoint State Street for a year subject to a  
5 renewal on for cause or termination earlier for cause.

6 MS. BAER: And, Your Honor, we'll also provide in  
7 the order that State Street will be subject to the Court's  
8 fee application procedure.

9 THE COURT: Yes, please.

10 MS. BAER: We're fine with that. Thank you, Your  
11 Honor.

12 THE COURT: That's their professionals that is.

13 MS. BAER: Yes, Your Honor.

14 THE COURT: Okay.

15 MS. BAER: Your Honor, turning to matter number 4,  
16 the motion of Oldcastle for relief from the automatic stay.  
17 Oldcastle has agreed to continue that matter until December.  
18 We are trying to work through that with them.

19 THE COURT: Good afternoon.

20 MR. SULLIVAN: Your Honor, I don't . . .  
21 (microphone not recording).

22 THE COURT: You have to use a microphone. I can't  
23 hear you.

24 MR. SULLIVAN: Bill Sullivan on behalf of  
25 Oldcastle. We have exchanged some materials, and we do agree

1 to continue till December.

2 THE COURT: Okay, thank you.

3 MS. BAER: Your Honor, the next matter on your  
4 calendar is the debtor's application to employ Protiviti as  
5 its Sarbanes-Oxley compliance advisor. Your Honor, we  
6 received one objection on this matter. It was from the  
7 United States Trustee's Office. His only objection related  
8 to the nunc pro tunc nature of the application.

9 THE COURT: Has that been filed. I didn't check in  
10 the last couple of days, I was out of the office, but I  
11 haven't yet seen it.

12 MR. PERCH: Good afternoon, Your Honor, Frank Perch  
13 for the United States Trustee. Your Honor, unfortunately I  
14 was reminded in discussing this matter with counsel earlier  
15 today of what the problem had been. There had been several  
16 attempts to docket that application either on an evening or  
17 over a weekend during which the electronic case filing system  
18 was not working properly, and it got bounced apparently and  
19 did not get docketed. I am fully responsible for the fact  
20 that it was not picked up at some point after that because  
21 that was awhile ago, and it did not get docketed. If the  
22 Court does not have it, and the Court does not want to  
23 consider it, I understand the Court's previous statements to  
24 that effect.

25 THE COURT: Okay. As of November 4th, which is the

1 last time I believe that the docket was checked, I hadn't  
2 seen it. So I still don't know what it says, although I  
3 appreciate from the last hearing that it was going to be  
4 something to do with the nunc pro tunc nature of it.

5 MR. PERCH: It's solely related to the nunc pro  
6 tunc, and we -- I've attempted -- I've been in discussions  
7 with Protiviti's counsel, and I have attempted to come to  
8 some resolution of that, and unfortunately we just haven't  
9 quite been able to find a meeting point on it.

10 THE COURT: All right. Get it docketed today, Mr.  
11 Perch, and go forward with it now.

12 MR. PERCH: Okay.

13 THE COURT: I want it docketed and in the future  
14 I'm not going to hear them if they're not docketed.

15 MR. PERCH: I understand that, Your Honor, and as I  
16 said, I would understand if the Court didn't want to hear it  
17 at all. The application was filed on September 22nd, Your  
18 Honor, seeking to retain Protiviti as the Sarbanes-Oxley  
19 compliance consultant nunc pro tunc to June 30th, 2003, and  
20 the statements in the application as to why that delay of  
21 almost three months took place in filing the application were  
22 that there was a need to complete a conflict search and  
23 certain issues regarding who was representing Protiviti. In  
24 conjunction with having discussed this with Protiviti's  
25 counsel, he provided me two proposed supplemental affidavits,

1 which I think themselves have not been docketed either, that  
2 indicate that the conflict check was completed on or about  
3 August 4th, and it's my understanding that if Protiviti's  
4 witness, Ms. Henderson (phonetical), would testify that's  
5 what she would say, and I'm not going to dispute that. I'm  
6 not sure why it is that a conflict check would take almost a  
7 month, but let's assume that it did. The two observations I  
8 have about the situation are that I'm not seeing in any of  
9 the papers here some specific requirement as opposed to a  
10 desire that the work commence before the conflict check be  
11 completed such that, for example, was there an SEC deadline  
12 or something that had to be met, a quarterly SEC filing that  
13 had to be made that had to contain some certification under  
14 Sarbanes or something of that sort. If that fact had been  
15 true, I would have hoped somebody would have explained that  
16 to me, and I would have been able to consider that.

17 Typically when one looks at the case law with respect to nunc  
18 pro tunc retentions, one sees that there are really two  
19 elements that are required. One is that there be some  
20 explanation of an appropriate nature and the Third Circuit  
21 has used the words "extraordinary circumstances" provided for  
22 the delay. The second is that the party seeking retention in  
23 fact be eligible to be retained as of the date for which they  
24 seek retention to which I would propose that in reality, they  
25 weren't in a position to certify that they were eligible to

1 be retained until they had completed their conflict check and  
2 certified that they were not disinterested -- or that they  
3 were disinterested, I'm sorry. And so since what I've been  
4 advised is that Protiviti's witness would testify that their  
5 conflict check was completed on or about August 4th, it would  
6 seem that at a minimum, Your Honor, that there isn't a basis  
7 to approve the retention prior to that date.

8 THE COURT: Well, I don't know if you have to have  
9 a conflicts check finished by that time, I mean, it seems to  
10 me that in many instances we appoint people on an interim  
11 basis because the conflicts checks take a very long time.  
12 Now, I don't know in this specific case why it would take so  
13 long, but with major counsel that have national and  
14 international offices, we frequently enter those retention  
15 applications and then they're subject to continuous  
16 disclosures, and at some point in time, a conflict may  
17 develop, but that doesn't mean that they weren't eligible as  
18 of the date that they started the conflicts check.

19 MR. PERCH: Well, they're subject to continuous  
20 disclosures, but typically, with respect to -- and once  
21 again, I don't -- I have not engaged -- this is not the type  
22 of thing that would lead me to engage in extensive discovery  
23 regarding Protiviti's conflict check procedures, but I'm  
24 familiar enough with how law firms do it from having looked  
25 at this with a number of law firms and most law firms are



1 able to take some kind of a preliminary read --

2 THE COURT: Yes.

3 MR. PERCH: -- of their conflict system virtually  
4 instantaneously because they're called by clients and they  
5 may need to work right away and they don't want to do  
6 something until they've at least done a preliminary check  
7 with their conflicts. I'm not sure that that happened here.

8 THE COURT: Okay. Do I understand correctly that  
9 -- let's see, RHI is Protiviti's parent?

10 MR. PERCH: Yes.

11 THE COURT: But RHI is not related to the debtor in  
12 this case?

13 MR. PERCH: That's the representation, yes.

14 THE COURT: Okay. Is this the same RHI that is the  
15 parent of either Narco or Jit (phonetical) in one of my  
16 Pittsburgh asbestos cases? Is it the same RHI?

17 MR. PERCH: I couldn't speak to that.

18 MR. LAWLAR: Your Honor, I'm sorry, James Lawlar.  
19 I'm counsel for Protiviti. Robert Half International, which  
20 is an employment agency.

21 THE COURT: No, okay, thank you.

22 MR. PERCH: Okay.

23 THE COURT: All right. Okay. So it's only the  
24 nunc pro tunc nature that you object to.

25 MR. PERCH: That's correct.

1 THE COURT: Okay.

2 MR. PERCH: I have no other objection.

3 THE COURT: All right. Ms. Baer?

4 MS. BAER: Your Honor, counsel for Protiviti is  
5 here, and I believe it would be more appropriate if he  
6 addressed the Court directly on that issue.

7 THE COURT: All right. Good afternoon.

8 MR. LAWLAR: Good afternoon, Your Honor. James  
9 Lawlar, Wollmoth Maher & Deutsch on behalf of Protiviti. I  
10 just wanted to update, Your Honor. We did send supplemental  
11 affidavits to Mr. Perch last week. We know that there's a  
12 freeze on filing things so they didn't get filed.  
13 Essentially what happened, and I'll give you a quick rundown,  
14 Protiviti is owned by RHI. RHI is a huge employment person.  
15 If you needed a temporary employee they provide that service.  
16 They provide it to thousands of companies across this  
17 country. They have a huge accounts payable system. They ran  
18 the check. That was the longest period of time to get that  
19 information back. Of course, Bank of America, again,  
20 everybody's on that list. You have to determine whether or  
21 not there's really anything there. They knew initially there  
22 was no conflict with Grace and Grace's entities, but the  
23 issue was whether on the 18th page conflict checklist there  
24 was anybody else that may have been in conflict. They came  
25 up clean. There's no impairment on disinterestedness,

1 impairment on any conflict basis to prevent Protiviti's  
2 retention. What happened was the affidavit was submitted to  
3 Kirkland & Ellis. The debtor decided it wanted it changed,  
4 the retention basis, it changed the format of how it wanted  
5 to retain Protiviti. That did not get communicated back to  
6 me until the end of August. So the affidavit was submitted  
7 early August, the end of August they wanted us to change it.  
8 That's the real reason for the delay. It was that  
9 miscommunication period. We revised the affidavit, submitted  
10 it early September, didn't get it submitted until the end of  
11 September. I don't know the reason why counsel took so long.  
12 They may have been just making sure it was correct. I'm not  
13 sure. The problem is it was out of Protiviti's control.  
14 Protiviti did everything he could. He got the affidavit, did  
15 a proper conflicts check, made sure that there is not basis  
16 to have it -- this will have and submit it to the debtor.  
17 The debtor wanted to change it. It went along with the  
18 change. All this time it's providing the services which are  
19 Sarbanes-Oxley and everybody knows that Sarbanes-Oxley  
20 nowadays means you'd better get somebody in there and make  
21 sure your books are clean, and that's what this whole process  
22 is, is cleaning up the books of Grace to make sure they are  
23 Sarbanes-Oxley compliant. They asked Protiviti to begin  
24 right away. Protiviti agreed to do that thinking they had  
25 done everything they needed to do. There was substantial

1 work done in July and in August. So with any type of nunc  
2 pro tunc pretention that doesn't go back that far is going to  
3 severely hurt Protiviti for services it provided that  
4 apparently the debtor thinks they're fine. So the issue  
5 really was -- was not in the control of Protiviti. They  
6 tried diligently. I made many phone calls, and we worked  
7 through it, and we got it filed. Protiviti did what it was  
8 supposed to do with respect to proper retention procedures  
9 and made sure it was clean and disinterested, you know. The  
10 work that was done was important work that Grace said had to  
11 be done, and Protiviti has no basis other than to rely on the  
12 debtor on that one, Your Honor. So I think under the factors  
13 of Arkansas, we fit within the factor. The question is, it  
14 was a long period of time, you know, it's a significant  
15 period of time, and we recognize that, but -- so it doesn't  
16 make sense to penalize Protiviti when it's not really  
17 Protiviti's fault and frankly what you're doing is you're  
18 giving the estate a windfall for work that it's provided to  
19 the estate that it needs. Thank you, Your Honor.

20 THE COURT: Ms. Baer, what happened?

21 MS. BAER: Your Honor, my understanding was there  
22 was a mixup in communication because Protiviti had one  
23 counsel and then had another counsel and apparently messages  
24 were not communicated to the right people. The nature of the  
25 retention was in fact changed, and that took some time to get

1 the affidavits changed. The delay after the affidavits were  
2 finally changed I think actually had to do with the timing  
3 for filing before the next court hearing and the fact that  
4 one had been missed, and then it was held off until the next  
5 one because one had just been missed. But, Your Honor, it's  
6 certainly not appropriate to penalize Protiviti here. They  
7 did come in, and they did start the work right away. It  
8 would have been -- our second quarter's financial statements  
9 would have been due and Sarbanes-Oxley obviously is a very  
10 significant issue that the debtor did need advice on  
11 immediately, and Protiviti did agree to render that advice  
12 and work immediately.

13 THE COURT: Okay. Well, those deadlines are not  
14 maximum deadlines. They're minimum -- I mean those are  
15 maximum deadlines, not minimum. That doesn't make any sense  
16 to hold up a retention application simply to get it onto the  
17 next omnibus. If you miss the deadline for one the hearing's  
18 going to come up later, but at least your affidavit's of  
19 record. I don't understand that.

20 MS. BAER: Your Honor, it may not have been the  
21 correct thing to do but unfortunately, I think that is what  
22 happened.

23 THE COURT: Well, I think Kirkland maybe better get  
24 whoever's doing its filing to appreciate the fact that when  
25 there's a retention application it better get it of record a

1 little sooner than this when it's holding the information,  
2 because it could very well end up penalizing somebody and in  
3 fact the next time it probably will. So -- Mr. Perch, I  
4 think under these circumstances, it appears that it's not the  
5 fault of Protiviti, and I understand the case law that  
6 indicates that it's up to the professionals to make sure that  
7 the steps are taken, but frankly I'm not sure what else when  
8 you're involved in a case and you've got Kirkland & Ellis  
9 doing the filing for you, you're supposed to do except rely  
10 on the reputation of that firm to get it done. So, I think  
11 under these circumstances, this is enough of an excusable  
12 neglect that I'll award -- I will approve the application  
13 process nunc pro tunc but it's coupled with a severe warning  
14 to Kirkland not to do this again, not to delay like this  
15 again. All right.

16 MR. PERCH: I understand . . . (microphone not  
17 recording), Your Honor.

18 THE COURT: All right, so, do you have an order,  
19 Ms. Baer, or would you like to submit one?

20 MS. BAER: We do, Your Honor, have an order.

21 THE COURT: I'll take it then if you have it.  
22 Thank you. Okay, that order is entered, thank you.

23 MS. BAER: Thank you, Your Honor.

24 THE COURT: All right. I received on -- with  
25 respect to item number 6, that's the debtor's request to

1 retain Mr. Hamlin as the Futures Rep., a request to postpone  
2 this, but frankly, I think we should go forward with this  
3 matter because I'm very concerned about the application, and  
4 under the circumstances, I don't think Mr. Hamlin can  
5 represent the Futures. I don't think he ever will be able to  
6 represent the Futures in this case, and I don't see any point  
7 to delay that decision. We need a Futures Rep. So I asked  
8 to keep this on although I saw the request to postpone it, I  
9 simply don't see a basis to postpone it because I don't see a  
10 basis to grant the application.

11 MS. BAER: Your Honor, frankly, this all came up  
12 very quickly all at one time and --

13 THE COURT: Yes.

14 MS. BAER: -- that's why we filed it. Your Honor,  
15 I think under the circumstances, that it would simply make  
16 sense for us to withdraw the application.

17 THE COURT: Okay, if that's the way you want to do  
18 it, that's fine. I'll accept an order that permits the  
19 debtor to withdraw or that indicates that the debtor has  
20 withdrawn the application.

21 MS. BAER: Thank you, Your Honor, we will submit  
22 that.

23 THE COURT: All right. Okay, ??

24 MS. BAER: Your Honor, matter number 7, motion to  
25 compel filed by Wesconn, we are working through this matter

1 MS. BAER: It does, Your Honor.  
2 THE COURT: Fine. Anything else?  
3 MS. BAER: That's all we have, Your Honor.  
4 THE COURT: Anyone on the phone?  
5 UNIDENTIFIED SPEAKER: No.  
6 THE COURT: Okay, thank you.  
7 MS. BAER: Thank you.  
8 THE COURT: We're adjourned.

9 (Whereupon at 1:00 p.m. the hearing in this matter  
10 was concluded for this date.)  
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12  
13  
14  
15

16 I, Elaine M. Ryan, approved transcriber for the  
17 United States Courts, certify that the foregoing is a correct  
18 transcript from the electronic sound recording of the  
19 proceedings in the above-entitled matter.  
20

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